LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 603.

DELAWARE SPORTS SERVICE, a Delaware Partnership Comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman,

Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

and

THE STATE OF DELAWARE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM S. POTTER,
HUGH CORROON,
350 Delaware Trust Building,
Wilmington, Delaware 19801,

JOHN B. KING,
One Parkway,
Philadelphia, Pennsylvania 19102,
Attorneys for Respondent, The Diamond State Telephone Company.

International, 711 So. 50th St., Phila., Pa. 19143

INDEX.

	Page
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	6
The Petition Should Be Denied Because It Presents No Federal Question of Substance	6
I. The Petitioner Is Not Being Deprived of a "Legitimate Business Activity"	6
II. Petitioner's Rights of Freedom of Speech or of the Press Have Not Been Abridged	8
III. The Commission and the Delaware Courts Decided the Question of the Sufficiency of the Evidence in Accordance With Applicable Decisions of This Court	9
CONCLUSION	11

TABLE OF CASES CITED.

	Page
Edison Co. v. Labor Board, 305 U. S. 197 (1938)	9
Hamilton v. Western Union Telegraph Co., 34 F. Supp. 928 (N. D. Ohio, 1940)	6
Howard Sports Daily v. Weller, 17 Md. 355, 18 A. 2d 210 (Ct. App., 1941)	8
Labor Board v. Columbian Co., 306 U. S. 292 (1938)	9
Sports News Service, Inc. v. Chesapeake & Potomac Tel. Co., 25 P. U. R. 2d 106 (DC PUC 1958)	8
State v. Western Union Tel. Co., 12 N. J. 468, 97 A. 2d 480 (Sup. Ct., 1953)	9
Taglianetti v. New England Tel. & Tel. Co., 81 R. I. 351, 103 A. 2d 67 (1954)	6
Telephone News System, Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N. D. Ill., 1963), aff'd 376 U. S. 782 (1964)	6
Tracy v. Southern Bell Tel. & Tel. Co., 37 F. Supp. 829 (S. D. Fla., 1940)	6
United States v. Smith, 209 F. Supp. 907 (E. D. Ill., 1962)	9

CONSTITUTIONAL AND STATUTORY PROVISIONS.

	Page
Delaware Code:	
Title 11, Section 674	6, 7
Title 11, Section 677	2, 7
Title 26, Section 183	2, 9
Constitution of the State of Delaware:	
Article II, Section 17	1, 6
Constitution of the United States:	
Fifth Amendment	11
Fourteenth Amendment	3, 11

IN THE

Supreme Court of the United States.

October Term, 1964.

No. 603.

DELAWARE SPORTS SERVICE, a Delaware Partnership Comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

and

THE STATE OF DELAWARE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONSTITUTIONAL PROVISIONS INVOLVED.

In addition to the constitutional provisions cited in the petition, this case involves Article II, Section 17 of the Constitution of the State of Delaware, which provides:

> "Section 17. Lotteries. The sale of Lottery Tickets, pool selling and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

STATUTES INVOLVED.

In addition to the statutes cited in the petition, this case involves Title 11, Section 677 of the Delaware Code, which provides:

> "Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

and Title 26, Section 183 of the Delaware Code which provides:

> "(a) All hearings before the Commission, or its designated representative, shall be public, and shall be conducted in accordance with the rules of practice and procedure prescribed by the Commission. In the conduct of such hearings, the Commission shall not be bound by the technical rules of evidence. A full and complete record shall be kept of all proceedings had before the Commission, or its representative, in any formal hearing, and all testimony shall be taken down by a reporter designated by the Commission, and the parties shall be entitled to be heard in person or by attorney, and to introduce evidence.
>
> "(b) After the conclusion of the hearing, the Commission shall make and file its findings with its opinion, if any, and its order thereon. Its findings shall be in sufficient detail to enable the court on appeal to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence."

COUNTERSTATEMENT OF THE CASE.

The essence of the petition for certiorari is that the order of the Delaware Public Service Commission (hereinafter sometimes referred to as "Commission") authorizing discontinuance of petitioner's telephone service violated the due process clause of the Fourteenth Amendment and infringed petitioner's right of freedom of speech and of the press because the Commission did not have a sufficient evidentiary basis on which to make its finding that Respondent, The Diamond State Telephone Company (hereinafter sometimes referred to as "Telephone Company") was justified in concluding that petitioner was using its telephone service for an unlawful purpose. Petitioner admits inferentially that if the Commission's order was based on competent evidence, there was neither a denial of due process nor an infringement of freedom of speech or press. Consequently, it is necessary to examine the evidentiary basis of the Commission's order.

Petitioner's statement of the case contains matter which is immaterial to the essential issue of sufficiency of the evidence and omits reference to an abundance of evidence which supports the Commission's order. It might be noted here that the transcript of the record of the hearing before the Commission covers 699 pages. Petitioner's appendix containing references to alleged incompetent evidence presented to the Commission covers approximately fourteen pages; in at least one instance, the same evidence is included more than once (Petition, pp. 68a, 77a).

The following references to the hearing before the Commission are not intended to be a complete review of the competent evidence presented to it, but only the salient parts of that evidence. It is respectfully suggested to the Court that almost every page of that record contains some evidence upon which the Commission could have based its findings and opinion.

The information disseminated by petitioner is necessary to bookmakers and off-track bettors because the unofficial winner is almost always the official winner (R. Com., No. 25, p. 132; No. 25a, p. 212);[1] the results of a race are generally available in less than a minute from the time the race is completed (R. Com., No. 27, p. 632); the service is so rapid it enables the bookmaker to determine the actual start and finish times of races (R. Com., No. 27, p. 608); and the speedy receipt of this knowledge assists him in making decisions on "layoff" bets and his customer in making further bets the same day (R. Com., No. 25, pp. 130-33; No. 25a, pp. 182-84).

The customers to petitioner's service commonly use fictitious names (R. Com., No. 25, pp. 88, 105); petitioner does not know the real names of his customers and makes no effort to find out (R. Com., No. 27, pp. 539, 560-61, 651); payment for the service must be made in advance by Western Union telegram and money order only (R. Com., No. 27, pp. 602-03, 690); and petitioner keeps no customer list showing names and addresses except to the extent of unused remittances and these are kept by the name used on the telegram and the city of origin (R. Com., No. 27, pp. 577, 603). The charge ranges from $20 for the results of one race to $50 for the results of four or five races (R. Com., No. 27, pp. 603, 605).

Albert Tollin (one of the petitioning partners) testified that the reason why people pay that price for information available at no cost a short time later is to relieve their anxiety (R. Com., No. 27, pp. 581-83). Mr. Tollin further testified that speed or avoidance of a time lag of approximately thirty minutes in furnishing results is the "commodity" that petitioner sells and which gives it a competitive advantage over newspapers and radio stations (R. Com., No. 27, pp. 590-91); and that on a "haphazard

1. Citations are to the transcript of the hearing before the Commission which is part of the numbered docket entries, and will follow petitioner's form of citation: (R. Com., No. —, p. —).

guess" petitioner has somewhere between 500 and 1,000 customers a year who are desirous of purchasing this commodity (R. Com., No. 27, p. 688).

On April 14, 1958, Albert Tollin and his late father Joseph Tollin, signed the following statement witnessed by a Delaware state detective and an investigator for the Chesapeake and Potomac Telephone Company:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors." (R. Com., No. 25a, pp. 271-2)

The sworn testimony of Joseph Tollin before the District of Columbia Public Utilities Commission revealed the nature of petitioner's business and the fact that it was useful to bookmakers and off-track bettors and to no one else (R. Com., No. 27, pp. 604-17).

ARGUMENT.

The Petition Should Be Denied Because It Presents No Federal Question of Substance.

The question presented in this proceeding can be simply stated: Was there evidence presented to the Delaware Public Service Commission of probative value sufficient to justify the findings and opinion of the Commission? The Delaware courts have held that there was.

I. The Petitioner Is Not Being Deprived of a "Legitimate Business Activity."

Petitioner does not deny that the authorities are unanimous in holding that a public utility is justified in terminating telephone service to a customer if it has reasonable grounds to believe that the service will be used for an unlawful purpose. *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (N. D. Ohio, 1940); *Tracy v. Southern Bell Tel. & Tel. Co.*, 37 F. Supp. 829 (S. D. Fla., 1940); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (1954); *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (N. D. Ill., 1963), *aff'd* 376 U. S. 782 (1964).

Petitioner's argument is confusing, however, because it repeatedly assumes the lawfulness of petitioner's business in spite of a determination to the contrary by the Delaware Public Service Commission, and the Delaware Superior Court and the Delaware Supreme Court. There is no dispute that petitioner provides instantaneous results of horse races by means of a call service. Article II, Section 17 of the Constitution of the State of Delaware prohibits all forms of gambling except on horse races at race tracks by the use of pari-mutuel or totalizator machines. Title 11, Section 674 of the Delaware Code makes unlawful the dissemination of information in furtherance of gambling

or for gambling purposes by means of a call service. Title 11, Section 677 of the Delaware Code provides that Section 674 shall be deemed an exercise of the police power of the State of Delaware for the protection of the public welfare, morals, etc., of the people of that state.

The Commission found from the evidence presented to it that there exist reasonable grounds to believe that petitioner is engaged in the activity proscribed by the cited laws of Delaware. Petitioner contends that the evidence was insufficient to support such a finding and that its business is, therefore, a lawful activity which cannot be proscribed. But it then assumes the result it seeks by stating that its business is "lawful in itself" (Petition, pp. 16, 22), "lawful in and of itself" (Petition, p. 17), "lawful in character" (Petition, p. 18), "legitimate business activity" (Petition, p. 19), and "conduct inherently lawful" (Petition, p. 23). Such statements cannot, of course, alter the fact that the Commission found from a preponderance of the probative evidence that petitioner's business is unlawful as violative of the public policy of Delaware as declared in the Delaware constitution and statutes.

Petitioner's argument also, to some degree, rests on the assumption that the flash service may be used for a lawful as well as an unlawful purpose by the customer. A reading of the record can lead to only one possible conclusion, the one that was reached by the Delaware Public Service Commission and affirmed by the Delaware Courts, namely that petitioner is disseminating flash results of horse races primarily, if not solely, for the use of bookmakers, and that such flash results are of special use to bookmakers and off track bettors and of no known use to anyone else.

Although petitioner Tollin suggested that the service might be used by horse owners, trainers or touts,[2] he did not identify any of his customers as such, and he offered no reason why such people would require flash results of

2. R. Com., No. 27, pp. 566-70.

the races at premium prices, when the information is available approximately one-half hour later through general news media at a nominal cost or no cost. Mr. Tollin's statement that the service might be used by "anyone who has sent a bet to the track [bets at tracks are permitted by the Delaware Constitution] and is anxious to find out whether his horse won or lost"[3] would stretch anyone's credulity if applied to the 500 to 1,000 customers of petitioner's flash service.

No federal question exists, therefore, because petitioner has not been deprived of a "legitimate business activity" by being denied telephone service. The Delaware Commission and courts have decided that petitioner's activity is unlawful.

II. Petitioner's Rights of Freedom of Speech or of the Press Have Not Been Abridged.

Petitioner's argument on this point seems to be that it is engaged in the business of reporting news after the happening of the event and that this feature of the business makes it comparable to regular and ordinary news media such as radio, television and newspapers.

It is quite evident that the type of "news" provided by petitioner is entirely different from that supplied by ordinary news media, and is furnished to the petitioner's customers for gambling purposes and in furtherance of gambling by use of the respondent's services. See: *Sports News Service, Inc. v. Chesapeake & Potomac Tel. Co.*, 25 P. U. R. 2d 106 (DC PUC 1958).

As noted in *Howard Sports Daily v. Weller*, 17 Md. 355, 18 A. 2d 210 (Ct. App., 1941), the petitioner here is attempting to force the respondent company to participate in its illegal operations. In that case it was held that there was no abridgment of freedom of speech where the court refused to lend its aid to enforce a contract "which is in-

3. R. Com., No. 27, p. 569.

consistent with sound morals or public policy, or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions". The court also noted that the publisher was not being denied the privilege of expressing its opinion on any subject.

The constitutional guarantee of freedom of speech does not apply where the only activity sought to be protected is the transmission of messages in violation of state law and where no effort is made "to utter a single word or express a thought on any topic of public interest or concern". *State v. Western Union Tel. Co.*, 12 N. J. 468, 97 A. 2d 480 (Sup. Ct., 1953); *United States v. Smith*, 209 F. Supp. 907, 918 (E. D. Ill., 1962).

The reasonable exercise of the police power of the state to enforce the state's clearly expressed constitutional and statutory prohibition against gambling should not be defeated by an appeal to "freedom of speech or press" by a petitioner whose operations are designed for gambling purposes or for use in furtherance of gambling.

III. The Commission and the Delaware Courts Decided the Question of the Sufficiency of the Evidence in Accordance With Applicable Decisions of This Court.

Title 26, Section 183 of the Delaware Code provides that the Commission is not bound by the technical rules of evidence in the conduct of its hearings. This Court has held that such authority to accept evidence not conforming to the technical rules of evidence is subject to the qualification that the findings of the administrative body must be supported by substantial evidence or evidence having "rational probative force." *Edison Co. v. Labor Board*, 305 U. S. 197, 229-30 (1938); *Labor Board v. Columbian Co.*, 306 U. S. 292, 299-300 (1938).

The opinions of both the Commission and the Delaware Superior Court, affirmed *per curiam* by the Delaware Supreme Court, specifically recognized and applied the rule

as to the necessity for probative evidence as that rule has been stated by this Court (R. Super. Ct., 20, 10, pp. 13-14; R. Com., No. 19, pp. 10-11). The Attorney General of Delaware recognized, as did the Commission and the Delaware courts, that much of the evidence offered at the hearing would not be competent in a court of law. But the petitioner ignores the fact that the Commission specifically stated in its findings and opinion:

> "We have accepted only that evidence which was within the direct knowledge or experience of the witness, given previously before a competent tribunal under oath or in sworn statements or submitted by stipulation. Thus, we have accepted that portion of Mr. Wassmer's testimony dealing with the Petitioner's subscribers he found to be operating in New Jersey, Pennsylvania and Washington, D. C., which he verified by personal visits to those places. We do not accept similar information received in letters from persons who did not testify under oath before this Commission." (R. Com., No. 19, pp. 10-11)

It can be only by design that petitioner ignores the fact that the Commission and the Delaware court considered all the evidence, rejected that part of it they deemed not probative, and accepted only that evidence in support of their findings which conformed to the standards of probative value set by this Court. Petitioner sets forth in its appendix fourteen pages of excerpts from the record of the Commission and characterizes the matter as incompetent evidence. No discussion or citation of authority is set forth in support of such a characterization.

Petitioner is asking this Court to issue the writ on the ground that the Commission did not have sufficient competent evidence before it on which to base its ruling. As stated above, the transcript of the record before the Commission covers 699 pages. Some of the evidence contained therein is referred to above in the counterstatement of the

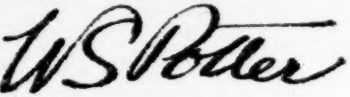
case. The overwhelming weight of the probative evidence shows that petitioner's use of the Telephone Company's service is in violation of the public policy of the State of Delaware.

The petitioner was afforded a fair hearing before the Commission. Since the probative evidence demonstrated conclusively that petitioner was using the service provided by the Telephone Company for an unlawful purpose, petitioner was not deprived of any rights in violation of the Fifth Amendment or the Fourteenth Amendment.

CONCLUSION.

No federal question of substance is presented in the petition and petitioner has not been unconstitutionally deprived of any right. Consequently, no special or important reasons exist for the granting of the petition. The petition for a writ of certiorari to the Supreme Court of the State of Delaware therefore should be denied.

Respectfully submitted,



WILLIAM S. POTTER,
HUGH CORROON,
350 Delaware Trust Building,
Wilmington, Delaware 19801,

JOHN B. KING,
One Parkway,
Philadelphia, Pennsylvania 19102,
Attorneys for Respondent,
The Diamond State Telephone Company.

Dated: November 17, 1964